IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION,
INDIANA & MICHIGAN ELECTRIC COMPANY,
INDIANA STATEWIDE RURAL ELECTRIC COOPERATIVE, INC.,
INDIANAPOLIS POWER & LIGHT COMPANY,
NORTHERN INDIANA PUBLIC SERVICE COMPANY,
PUBLIC SERVICE COMPANY OF INDIANA, INC., AND
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
SIERRA CLUB,
METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR,
NEW MEXICO CITIZENS FOR CLEAN AIR AND WATER, AND
STEVEN WINTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This petition is filed on behalf of seven electric utility companies which own, operate, and from time to time construct or modify coal-fired steam electric generating stations in the State of Indiana. The petitioning utilities are: Indiana-Kentucky Electric Corporation, Indiana & Michigan Electric Company, Indiana Statewide Rural Electric Cooperative, Inc., Indianapolis Power & Light Company, Northern Indiana Public Service Company, Public Service Company of Indiana, Inc., and Southern Indiana Gas and Electric Company.

Respondents are the U. S. Environmental Protection Agency which issued the regulations reviewed below, Sierra Club, Metropolitan Washington Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, and Steven Winter. The latter four parties intervened below as petitioners for review of the regulations.

The petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in the above cause on August 2, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit has not yet been officially reported, but is unofficially reported at 9 ERC 1129, and is included herein at Appendix I.

The order of the Court of Appeals for the Seventh Circuit transferring petitioners' review proceeding is not reported, but is set forth in Appendix I at A53-A54.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1976, and is set forth at Appendix I, A47-A52. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether State implementation plans which meet the eight criteria of Clean Air Act Section 110(a)(2) are also required by the Clean Air Act to prohibit significant deterioration of air quality.

2. Assuming plans must prohibit significant deterioration, whether the Environmental Protection Agency may, under Clean Air Act Sections 110(c) and 110(d), promulgate identical regulations revising all 55 implementation plans without according the States the opportunity to develop their own plan revisions and without public hearings within the States.

A subsidiary question is whether petitioner Indiana electric utilities are entitled to have revisions to the Indiana implementation plan so dictated reviewed by the Court of Appeals for the Seventh Circuit as provided by Section 307(b)(1) of the Clean Air Act.

STATUTE AND REGULATIONS INVOLVED

The provisions of the Clean Air Act Amendments of 1970, 42 U. S. C. §§ 1857 *et seq.*, primarily involved are set forth in Appendix II hereto.

The regulations under review, 40 C. F. R. §§ 52.01(d),(f) and 52.21 (1975), *as amended*, were promulgated by the U. S. Environmental Protection Agency as amendments to all state implementation plans under the Clean Air Act. They were published in the Federal Register, together with an explanatory preamble, on December 5, 1974 (39 F. R. 42509), and were revised on January 16, 1975 (40 F. R. 2802), June 12, 1975 (40 F. R. 25004) and September 10, 1975 (40 F. R. 42011). The regulations thus promulgated are set forth as Appendix III hereto.

STATEMENT OF THE CASE.

This case follows in the wake of the Court's four-to-four division three years ago in *Fri* v. *Sierra Club*.[1] The inconclusiveness of the Court's action there left in force a district court order which had been affirmed without opinion by the

1. *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D.C. 1972), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by equally divided Court, sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973). Petitioners were not parties to that litigation.

Court of Appeals for the District of Columbia Circuit. Pursuant to that order, the Administrator of the Environmental Protection Agency (EPA) determined that the implementation plans of every State, including Indiana, were defective to the extent they failed to prohibit "significant deterioration" of air quality in areas where the air was less polluted than allowed by national ambient air quality standards promulgated under the Act.[2]

After proposing several alternative plans for preventing significant deterioration[3] and holding public hearings at five sites[4] across the country—none in Indiana—EPA promulgated final regulations at 39 Fed. Reg. 42509 *et seq.* (Dec. 5, 1974). The regulations were incorporated as revisions into the implementation plans of every State, despite the lack of public hearings within Indiana or nine-tenths of the States and without regard to the prior content of the implementation plans affected.[5]

Petitioners sought to have the regulations affecting Indiana reviewed by the Court of Appeals for the Seventh Circuit as required by Clean Air Act Section 307(b)(1).[6] Over their objection, that review proceeding was transferred to the Court of Appeals for the District of Columbia Circuit and consolidated with thirteen other petitions for review filed in the various judicial circuits. On August 2, 1976, a panel of the District of Columbia Circuit rendered its decision upholding the regulations in every respect.

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2. 37 Fed. Reg. 23836-37 (Nov. 9, 1972). The order cautioned that some of the plans thus disapproved might later prove to have prevented "significant deterioration" all along, depending upon the definition of the phrase—a definition EPA indicated it would make up in later rulemaking.

3. 38 Fed. Reg. 18986 *et seq.* (July 16, 1973); 39 Fed. Reg. 31000 (Aug. 27, 1974).

4. Hearings were in Atlanta, Dallas, Denver, San Francisco and Washington, D. C., 39 Fed. Reg. 31000 (Aug. 27, 1974).

5. 40 C. F. R. 52.21(a); clarifying amendments were promulgated at 40 Fed. Reg. 2802 (Jan. 16, 1975); 40 Fed. Reg. 25004 (June 12, 1975); and 40 Fed. Reg. 42011 (Sept. 10, 1975).

6. 42 U. S. C. § 1857h-5(b)(1).

The Regulations

The significant deterioration regulations apply to all areas of the country where concentrations of sulfur dioxide or particulate matter are less than allowed by the national secondary ambient air quality standards established for those pollutants under Section 109(b) of the Act.[7] For such areas, the regulations impose a classification scheme which strictly limits increases in ambient pollutant concentrations to be allowed as a result of economic growth. In Class I areas, "practically any" increase in ambient levels of the two pollutants, and thus practically any economic growth, is prohibited.[8] In Class II areas, somewhat larger increases in the levels of those pollutants are allowed, so that what EPA deems "moderate well-controlled growth" is possible. In Class III areas, pollutant levels may reach the national standards.[9] Thus, an increase in ambient pollutant concentration which exceeds the allowable increment for an area constitutes "significant deterioration" of air quality in the area.

All clean air areas are initially designated Class II.[10] The regulations set forth procedures by which, subject to numerous conditions a State may propose, and EPA may approve, redesignation of an area to another Class. Among the prerequisites is a determination by EPA of the adequacy of the State's consideration of the following factors:

> . . . the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.[11]

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7. 42 U. S. C. § 1857c-4(b).
8. 39 Fed. Reg. 42510 (Dec. 5, 1974).
9. *Id.*
10. 40 C. F. R. § 52.21(c)(3).
11. 40 C. F. R. § 52.21(c)(3)(ii)(*d*).

Preconstruction review is the primary means of preventing breach of the allowable increments for an area. It is required for nineteen specified types of stationary sources of sulfur oxides or particulate matter,[12] and requires a determination by EPA (or a State authorized to perform the function) that emissions from the new source, together with emissions from all other sources (commercial, residential, industrial), will not violate the significant deterioration increments applicable to that area, or "any other area."[13] By referring to the effects of increments upon "any other area," the regulations thus impose a "shadow effects" rule that extends a zone's increment ceilings far beyond the boundaries of the zone itself. For most areas of the Nation, for example, EPA has suggested that a Class I inhibition could stretch 60 to 100 miles into a neighboring Class II or III area. 39 Fed. Reg. 42513 (Dec. 5, 1974). In addition, any such source is required to meet an emission limit, to be specified by the Administrator, which would result from application of the "best available control technology" for sulfur dioxide and particulate matter. 40 C. F. R. § 52.21(d)(2)(ii).

REASON FOR GRANTING THE WRIT

The Decision Below Decided Important Questions of Federal Law Which Should Be Expressly Settled by This Court.

The First Question—Is Section 110(a)(2) the Measure for State Implementation Plans?

The first question presented by this petition—whether the Clean Air Act requires that implementation plans prevent significant deterioration—was determined to be in need of settlement by this Court nearly four years ago when certiorari was granted in *Ruckelshaus* v. *Sierra Club*, 409 U. S. 1124 (1973). However, with only eight members participating, the Court was unable to decide the question, and the lower court's

12. 40 C. F. R. § 52.21(d).
13. 40 C. F. R. § 52.21(d)(2)(i).

opinion was affirmed *ex necessitate* by an equally divided Court *sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973).

The question is no less important today and should be settled by this Court.

The regulations at issue in fact place under several new levels of political and administrative control the economic development of the vast bulk of the land in the United States. Estimates vary as to the proportion of the country subject to the regulations. Petitioners' home state of Indiana, however, provides a quite conservative illustration, for only twelve states occupy less land,[14] but in terms of dollar value added by manufacturing, Indiana is the tenth most industrialized state.[15] The State, thus, has a relatively large number of pollution sources situated in a relatively small land area. EPA's recent action on Indiana's revised implementation plan strategy for sulfur dioxide approved classification of 85 of its 92 counties (or roughly 92% of its area) as having ambient sulfur dioxide levels less than allowed by the national secondary standards.[16] Thus, the decision below has subjected to Federal control the economic development and land use planning of over 90% of the land mass of this highly industrialized State.

The U. S. House of Representatives recently passed a bill which, if enacted as an amendment to the Clean Air Act, would have established a classification scheme identical to the one imposed by the regulations at hand, as shown by the following description:

> Initially most areas which are cleaner than the national ambient air quality standards with respect to any pollutant would be classified as Class II . . . Areas where air quality is worse than those minimum Federal standards would not be classified at all and would not be affected by this section

14. *U. S. Bureau of the Census, Statistical Abstract of the United States, 1975 (96th ed.)* Washington, D. C., 1975, at 176.

15. *Id.*, 749.

16. 41 Fed. Reg. 35676-77 (Aug. 24, 1976).

> since the goal in these areas is to attain and maintain the minimum Federal ambient standards.[17]

The committee report gave the following estimate of the proportion of the country subject to the bill's significant deterioration provisions:

> First, it must be re-emphasized that more than 98% of the country is initially designated Class II.[18]

Thus, the question whether the Clean Air Act requires state plans to contain non-degradation provisions may fairly be viewed as the question whether land use planning of more than 90% of the United States is subject to Federal administrative control.

The overriding importance of this question is self-evident.

Since dividing equally on the question of significant deterioration in *Fri* v. *Sierra Club*,[19] the Court has interpreted the Clean Air Act three times: *Union Electric Co.* v. *EPA*, ... U. S. ....., 44 U. S. L. W. 5060 (June 25, 1976); *Hancock* v. *Train*, ... U. S. ....., 44 U. S. L. W. 4767 (June 7, 1976); *Train* v. *Natural Resources Defense Council*, 421 U. S. 60 (1975).

The holdings in *Union Electric* and *Train* v. *NRDC* appear irreconcilable with the decision below. The Court held in *Union Electric* that EPA may not disapprove a State implementation plan on the basis of factors not among the eight criteria listed in Section 110(a)(2):[20]

> This approach is apparent on the face of § 110(a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the

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17. *House Comm. on Interstate and Foreign Commerce, Clean Air Act Amendments of 1976, H. R. Rep. No. 94-1175*, 94th Cong., 2d Sess. 120 (1976).

18. *Id.*, 149.

19. 412 U. S. 541 (1973).

20. 42 U. S. C. 1857c-5(a)(2).

> Administrator is not to be concerned with factors other than those specified, *Train* v. *NRDC*, 421 U. S. at 71 n.11, 79, and none of the eight factors appears to permit consideration of technological or economic infeasibility. Nonetheless, if a basis is to be found for allowing the Administrator to consider such claims, it must be among the eight criteria, and so it is here that the argument is focused.[21]

The major premise of the decision below, however, is precisely contrary to the quoted language and to the holding of *Union Electric*. That premise is that EPA shall *not* approve any implementation plan except upon determining that it meets a ninth criterion, implementation of a "Judicially-created requirement of nondeterioration" (App. I, A15).

While it appears that *Union Electric* should have controlled the proceeding below, the Court of Appeals avoided it on the argument that the precise issue of significant deterioration was not before this Court in that case(App. I, A24). This raises a question of Federal law, the extreme importance of which is belied by the obviousness of its answer: When Congress has written a statute which says EPA shall approve implementation plans which meet eight specified criteria, and the Supreme Court has construed the statute to mean that EPA shall approve, and cannot disapprove, implementation plans which meet the same eight criteria, should an additional criterion be added by judicial legislation and made the basis for disapproving State plans?

In *Train* v. *Natural Resources Defense Council*, 421 U. S. 60 (1975), the Court held that under Section 110(a)(3) of the Clean Air Act, EPA is required to "approve any revision of a state implementation plan," including the grant of variances to individual pollution sources, so long as the revision leaves the plan in conformity with the eight criteria in Section 110(a)(2)

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21. *Union Electric Co.* v. *EPA*, *supra*, 44 U. S. L. W. at 5063 (footnote omitted).

and is adopted after public notice and hearing. 421 U. S. 60, at 80, 99. The decision below concedes that significant deterioraton is not expressly included in Section 110 (App. I, A39), but flatly contradicts the holding of *Train* on the basis that this Court's language does not mean what it says (App. I, A23-A24). It approves EPA-imposed regulations which effectively prohibit the States from revising their plans or granting variances to accommodate new or modified sources in areas where national ambient air quality standards are met unless a host of new Federal requirements having no relation to Section 110(a)(2) are met.

The holding in *Train* was based upon the Court's analysis of the necessary characteristics of an implementation plan and the State-Federal division of responsibility for devising and revising the terms of a plan. That analysis is as follows:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.[22]

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22. 421 U. S. 60, 79 (1975), (footnote omitted; emphasis in original).

The decision below conflicts with the scheme set forth in this passage in the following respects:

1. It upholds EPA's promulgation of emission limitations and source review procedures which apply precisely and only where *not* necessary to meet national standards.

2. It upholds EPA action devising and promulgating a specific plan of its own for 55 States, districts and territories on grounds other than incongruence of their plans with Section 110(a)(2).

The Second Question—The Procedure for EPA's Revision of State Implementation Plans.

The second question presented by this petition is whether under Sections 110(c) and 110(d)[23] EPA may usurp the right of the States to develop their own implementation plans by promulgating requirements that plans prevent significant deterioration and on the same day imposing revisions of all 55 plans to satisfy the newly-defined requirements, all without hearings within the States.

In addition to the conflicts with the *Train* decision set forth above, the decision of the Court of Appeals, in upholding the procedure followed by EPA, is in further conflict with *Train*, as follows:

1. It upholds EPA's assumption of a primary, instead of a secondary, role in devising specific emission limitations for major sources in over 90% of the country.

2. It upholds EPA action devising and promulgating its own plans for 55 states, districts and territories without observing the procedures of Section 110(c), which the Court cited as applicable.

This question goes to the very heart of what an implementation plan is, how an implementation plan comes into being, and how one may be enforced. The statutory definition is in Section 110(d):

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23. 42 U. S. C. §§ 1857c-5(c) and 1857c-5(d), respectively.

> For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

This is a definition of fundamental importance to the functioning of the statutory scheme because according to Section 113, with minor exceptions, EPA is without power under the Clean Air Act to enforce anything but an "applicable implementation plan."[24] It is clear that the regulations at issue do not "implement[ ] a national primary or secondary ambient air quality standard . . ." and were not "approved under subsection (a)" of Section 110. It is obvious also that the regulations were not "promulgated under subsection (c)" of Section 110. That provision restricts EPA's authority to propose and promulgate revisions of State plans to three distinct circumstances: (1) a State's failure to submit a plan to implement a primary or secondary standard by the statutory deadline; (2) nonconformity of a plan with the requirements of Section 110; (3) a State's failure to revise a plan within 60 days of EPA's notice that the plan should be revised to achieve new primary or secondary standards or should achieve standards more quickly. None of these circumstances was the basis of the December, 1974, regulations, as the opinion below acknowledges (App. I, A38-A39).

Section 110(c) also requires that a State have the opportunity to cure its plan of any deficiencies EPA determines to exist, failing which EPA must hold public hearings within the State before promulgating any EPA-proposed revision of its plan. Here no State had the opportunity because contempo-

24. Clean Air Act, Section 113, 42 U. S. C. § 1857c-8. EPA can also enforce new source performance standards under Section 111, 42 U. S. C. § 1857c-6; emission standards under Section 112, 42 U. S. C. § 1857c-7; the inspection and reporting provisions of Section 114, 42 U. S. C. § 1857c-9; and the energy-related authorities of Section 119, 42 U. S. C. § 1857c-10.

raneously with promulgating the definition of significant deterioration, EPA issued its disapproval of all plans for failing to prevent significant deterioration. On the same day it revised each plan with curative regulations, thereby violating Section 110(c) by not holding public hearings in 46 of the affected States.[25]

The significant deterioration regulations then raise a distinct problem: Of the four attributes which define a regulatory provision as part of an applicable implementation plan, the regulations possess not one. The Supreme Court has explicitly noted that the characteristics set forth in Section 110(d), and particularly the characteristic of implementing national standards, are essential to the identity of an implementation plan:

> An exception which *does* jeopardize national standards, on the other hand, cannot be a revision because it would deprive the revised plan of a characteristic without which it cannot under the Act be an applicable plan. See § 110(d) which defines "applicable implementation plan" as the "implementation plan, or most recent revision thereof, which has been approved under [§ 110(a)(2)]. . . ."[26]

Thus, the question is whether an implementation plan is what it appears to the naked eye to be, or whether the gloss of legislative history actually operates to contradict the Supreme Court and to amend Section 110(d) to read:

> For the purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a), or promulgated under subsection (c) *or promulgated under the authority implicit in Section 101(b)(1) pursuant to such procedure as the Administrator shall employ* and which implements a national primary or secondary ambient air quality standard in a State *or which implements a prohibition against the significant deterioration of air quality in areas of a State where primary and secondary ambient air quality standards are met.*

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25. 39 Fed. Reg. 42509 *et seq.* (Dec. 5, 1974).

26. *Train* v. *Natural Resources Defense Council*, 421 U. S. 60, 90 n.25 (1975) (emphasis in original).

Whether such a fundamental rewriting of the Clean Air Act should be allowed to stand is an important question of Federal law which should be settled by this Court.

Judicial review of the significant deterioration regulations has also been at odds with the statutory scheme and has contributed to EPA's usurpation of the function of the States. The judicial review provision of the Clean Air Act reads in pertinent part:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B) or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.[27]

Petitioners contend, as they have since originally filing their petition for review in the Seventh Circuit, that the obvious meaning of this provision is that review of EPA action on a State implementation plan be performed "only" by the Court of Appeals for the Circuit in which the affected State lies. This is consonant with the repeated injunction in Section 110 that implementation plans may not be adopted or revised without a public hearing within the State, and that each plan is to be reviewed separately by EPA. It is consistent also with the congressional finding in Section 101(a)(3),[28] and direction in Section 107(a),[29] that air pollution control is the primary responsibility of the States and local governments. In the proceeding below Petitioners made substantial claims that, prior to EPA's disapproving and revising it, the Indiana implementation plan contained measures to prevent degradation of the State's clean air, and that differences between Indiana's plan and the one EPA devised for the purpose were not legal grounds for

27. Section 307(b)(1), 42 U. S. C. § 1857h-5(b)(1).
28. 42 U. S. C. § 1857(a)(3).
29. 42 U. S. C. § 1857c-2.

disapproving the State's plan. The court below, faced with arguments as to most of the plans in the Nation, did not review those claims. Petitioners submit that avoidance of such inadequate judicial review is only one of several reasons why the statutory phrase "appropriate circuit" should not be construed to mean that every petitioner for review should have to guess which circuit is the most appropriate, *Dayton Power & Light Co.* v. *EPA*, 520 F. 2d 703 (6th Cir. 1975) notwithstanding.

CONCLUSION

The decision below is in conflict with applicable decisions of this Court and, if allowed to stand, will have worked a major restructuring of State-Federal relationships and will have effectively rewritten a major piece of Federal legislation.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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